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May 5, 2000

Redacted – For Public Inspection

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room Number TWB-204
445 12th Street, S.W.
Washington, DC, 20554

Re: In the Matter of the Merger of Qwest Communications International, Inc. and U S West Inc., Docket CC-99-272

Dear Ms. Salas:

Pursuant to the Public Notices issued by the Commission on April 14, 2000 and April 25, 2000 and the Protective Orders issued November 17, 1999 and March 27, 2000, please find two copies of AT&T Corp.'s ("AT&T's") Comments on the Divestiture Compliance Report in the above referenced proceeding in redacted form. AT&T is separately filing confidential version of the Comments under seal.

Thank you for your attention to this matter. Please direct any questions to the undersigned.

Respectfully submitted,

Aryeh S. Friedman /ha

Aryeh S. Friedman

Enclosures

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REDACTED PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Merger of Qwest Communications International, Inc. and U S West Inc.	)	
In the Matter of Application for Consent to Transfer Control to TeleDistance, Inc. from Qwest Communications International, Inc. to Touch America, Inc.	)	Docket CC-99-272

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COMMENTS OF AT&T CORP. ON THE APPLICANTS' DIVESTITURE REPORT

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May 5, 2000

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COMMENTS OF AT&T CORP.

Pursuant to the Public Notice issued by the Commission on April 14, 2000 and April 25, 2000, AT&T Corp. ("AT&T") respectfully submits its Comments on the Divestiture Compliance Report of Qwest Communications International, Inc. ("Qwest") and U S West, Inc., ("U S West") (collectively "Applicants").

INTRODUCTION AND SUMMARY

As demonstrated below, the Divestiture Plan as set forth in the Divestiture Compliance Report ("Report") does not come close to eliminating the Section 271 violation that prevents lawful consummation of the Applicants' proposed merger. Indeed, Applicants have proposed essentially to "park" the transmission components of the in-region, interLATA services until such time as they comply with the Act and their Section 271 applications thus can be filed and granted. In the interim, Applicants will control nearly every other aspect of their in-region services provided to customers.

Further, Applicants' claim that Qwest will have no preferential right to reacquire the customers it divests is simply incorrect because they have structured their transactions with the so-called "Buyer" to make reacquisition of most, if not all, of the Transferred Customers by Qwest, after it obtains Section 271 authority, highly likely.

Because the proposed merger, if completed, would therefore result in the unlawful provision by a BOC of in-region interLATA services prior to the receipt of authorization pursuant to Section 271, it is not "consistent with the public interest," and must accordingly be denied.

ARGUMENT

I. QWEST'S PROPOSED DIVESTITURE OF ITS IN-REGION INTER-LATA SERVICES DOES NOT CURE THE SECTION 271 VIOLATION

A. The Governing Standard

The Commission has already ruled in this proceeding how it would determine whether Qwest's divestiture plan satisfies Section 271's[1] prohibition on Bell operating companies ("BOCs") and "any affiliate" of a BOC from "provid[ing]" certain interLATA services originating in any in-region state until such time as the Commission approves an application and determines compliance with the requirements of Section 271 for that State. Specifically, in the Qwest-U S West Merger Order[2] the Commission held:

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1 Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 271(a).

2 Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 99-272, Memorandum Opinion and Order, FCC 00-91 (March 10, 2000),

1. That, in the Qwest Order,[3] the Commission had determined that U S West's and Ameritech's agreement to provide certain services to Qwest, including marketing of Qwest's interLATA telecommunications services to U S West's and Ameritech's presubscribed local and intraLATA toll customers, constituted provision of interLATA service by U S West and Ameritech "because the package permitted the BOCs premature entry into the long distance market by allowing them to accumulate an entrenched base of full-service customers before receiving section 271 authority, thereby undermining the incentive Congress created in section 271."[4]

2. That in evaluating Qwest's divestiture plan in this proceeding "we will balance several factors including, but not limited to, whether the BOC obtains material benefits (other than access charges) uniquely associated with the ability to include a long distance component in a combined service offering, whether the BOC is effectively holding itself out as a provider of long distance service, and whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public" (emphasis added).[5] This includes the perception of Qwest as offering "one stop shopping" to customers.[6] If the Applicants provide to a buyer all of the services that were listed in the

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3 AT&T v. Ameritech et al., Memorandum Opinion and Order, 13 FCC Rcd 21438 (1998) aff'd sub nom US West Communications, Inc. v. FCC, 177 F.3d 1057 (D.C. Cir. 1999), cert denied, 120 S. Ct. 1240 (2000).

4 Qwest-U S West Merger Order ¶13.

5 Id. ¶18.

6 Id at f.n. 54.

divestiture plan it submitted at that time, that is, billing and collection services, customer care services, monitoring, trouble shooting and repair activities, marketing services for calling cards as an agent of the buyer, and in-region information services that do not incorporate an interLATA telecommunications transmission component, "it is highly likely that the totality of the Applicants' involvement would constitute the provisioning of interLATA service, in violation of section 271."[7] Indeed, the provision of anything beyond billing and collection services "such as receiving and placing orders for the buyer's customers, assisting in 'provisioning' activities, and acting in certain instances as 'agent' of the buyer," increased the likelihood that the merger would violate section 271.[8] A joint or cooperative marketing or sourcing agreement between the Applicants and the buyer "would lead to even greater scrutiny."[9] Indeed, "a divestiture arrangement that includes a joint or cooperative marketing or sourcing agreement, coupled with in-region customer support services and out-of-region long distance prior to receiving Commission authorization would mitigate the post-merger incentives to earn section 271 authorization."[10]

3. That the Applicants in their report should specifically address their post-divestiture use of in-region Internet backbone and an explanation as to how the merged company will dispose of Internet addresses and web-hosting servers for their Internet

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7 Id.

8 Id. ¶19.

9 Id.

10 Id. ¶23.

customers.[11] Finally, in order to comply fully with Section 271, the buyer must be independent of Qwest, and the divestiture of customers must be final and irrevocable, i.e. Qwest will have no preferential right to reacquire the customers it divests.[12]

As shown below, the Applicants will be providing to Touch America in-region customer support services including: (1) billing and collection services; (2) customer care services; (3) network provisioning, monitoring and maintenance services; and (4) acting in certain instances as agent of buyer. There are also joint or cooperative marketing and/or sourcing agreements between the Applicants and Touch America. Qwest will also be in a preferred position to re-acquire its divested business.

B. The Divestiture To Touch America Violates The Applicable Standards

1. Qwest is Providing Everything Except In-Region Transport.

The insignificance of this transfer, reflected in the relatively small purchase price, can be demonstrated by looking at what Qwest and Touch America will be providing to a "top Commercial account" with in-region headquarters which purchases in-region and out-of-region switched and dedicated long distance service. The transmission of the in-Region interLATA services will be provided by Touch America, and the

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11 Id. ¶ 25. The Commission also wanted the Applicants, with respect to the leasing of voice and data ports, to "make clear whether the traffic being transported by U S West would cross LATA boundaries." They have not done so.

12 Id. ¶14.

- In doing so, Qwest is engaging in activities typical of resellers.

- This means that Qwest will be perceived as the only entity capable of offering one-stop shopping for local as well as in-region and out of region long distance services.

- Again, Qwest is engaging in activities typical of resellers.[17]

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Again,

Qwest is engaging in activities typical of resellers.

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19 The Commission, in the Qwest-U S West Merger Order ordered that all ambiguity surrounding Qwest's provision of interLATA services had to be resolved in the Plan so that the FCC knew what it was being asked to approve, Id., ¶24.

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- [23]

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These arrangements effectively allow Qwest to provide one-stop shopping to multi-region, national accounts for local, in-region and out of region long distance service, prior to opening its markets to other carriers so that they can do the same.

The level of Qwest involvement is even greater with respect to calling card, prepaid card and operator services:

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The level of Qwest involvement is highest with respect to Internet Services, which Qwest concedes it is not divesting and is described in Section IIA below.

Thus, it is apparent from these Agreements that all Qwest is divesting is the in-Region interLATA transport itself. Indeed,

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The Commission made clear in the Qwest/U S West Merger Order that it would likely find a violation of Section 271 if -- as now proposed by Applicants -- Qwest will continues after the divestiture to provide customer care and other support services beyond

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billing and collection for in-region services,[37]

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2. Joint Marketing and Coordinated Sourcing

The Applicants assert that "Qwest and Touch America have no joint marketing agreement or co-sourcing agreement,"[41] that the issue is not ripe for decision because

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37 Qwest asserts that Touch America "has no obligation to take any of these services." Report at 4. However, unless the Applicants are taking the position that the contractual obligations are illusory and thus not legally binding at all, they are obligatory on Touch America.

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"Qwest has not entered into any coordinated marketing agreement, and does not plan to engage in coordinated marketing, with Touch America."[42]

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3. Qwest's Ability to Re-Acquire Divested Businesses

While perhaps Touch America cannot be legally compelled to transfer the divested business back to Qwest,[45] their Agreements are structured to ensure that Customer retention by Touch America will be unlikely.

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42 Id., at 49.

43 Id., at 46, n. 67.

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45 Report at 17.

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By providing all of the support services described above, Qwest is holding itself out as a provider of long distance services and is engaging in activities typical of resellers. And Qwest is the "one stop" source for existing customers to go to in order to obtain in-region and out-of-region long distance services, and if an in-region customer, local services as well. This will diminish Qwest's incentives to obtain Section 271 interLATA relief, and hinder competition by other carriers who are unable to satisfy customer demand for one-stop shopping.

C. The Applicants Claim That The Proposed Divestiture of In-Region InterLATA Transport Eliminates The Violation of Section 271 Is Without Merit

At bottom, Applicants' defense of their divestiture plan and continued provision of in-region long distance service reduces to the claim that Section 271 prohibits only the transmission of calls across interLATA boundaries. But this claim was firmly rejected by the Commission in the Qwest Order, and reaffirmed in the Qwest/U S West Merger Order. In the latter, the Commission made it clear that the provision of support services other than billing and collection would lead to heightened scrutiny, and that the amalgamation of all the services described herein will clearly violate Section 271. Applicants have ignored these prior holdings, and assert that the provision of additional support services under the Transitional Services Agreement is necessary to minimize the

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impact of the transfer on the affected customers. This assertion is ironic, unsupported, and irrelevant.

Since the Act was passed and continuing through the Commission's UNE Remand Order (which it is appealing), U S West has claimed that virtually every facility, feature, function, used in the offering of a telecommunications service is available from multiple sources. Applicants make no serious attempt to show that that this is not the case for the services and functions it will be providing to Touch America. Indeed, Touch America itself has noted its "[e]xceptional customer service" for all the services provided here.[49] Second, even if the provision by Qwest of some of these services to Touch America were "necessary" for a limited transition period, the provision of these services has not been so limited. The duration of the Transition Service Agreement is between one and two years: the support services provided for

may be binding on Touch America for an even longer period of time.

The Applicants further claim that their continued provision of such services for calling cards, prepaid cards, internet services and operator services under the four Special Product Agreements does not violate Section 271 because of the distinctive nature of

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these products and/or Commission or MFJ precedent[50] is similarly without merit. In fact, there is nothing to distinguish these services from the other switched and dedicated services, other than an effort by Qwest to misapply MFJ and Commission precedent in an effort to continue to provide in-Region calling card (pre- and post- paid) services. Qwest does not even attempt to explain why Internet services are "special" (other than it is a rapidly expanding service sector) and the Commission's prior denial of a Section 706 waiver to U S West to provide such services makes it very clear that they are not "special" in terms of Section 271.

The Applicants further contend that the provision of these services will not violate the tests set forth in the Qwest Order (ignoring the standards in the Qwest-U S West Merger Order): whether the BOC or BOC affiliate receives material benefits, is holding itself out as a provider of long distance services, and/or is engaging in activities typical of resellers. They further argue that these arrangements will not diminish Qwest's incentives to obtain Section 271 interLATA relief.

Specifically, the Applicants claim that these arrangements will not diminish Qwest's incentives to obtain Section 271 interLATA relief because they will not receive the actual revenues from the services provided in the "hole in the donut."[51] But Qwest gains indirect benefits through

[52] It greatly strengthens Qwest's ultimate position if

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50 Report at 5, 50-52 (Calling card); 57-61 (prepaid card); 64-66 (Internet services); and 86-87 (operator services).

51 Id., at 43 (transitional services); 48 (coordinated marketing); 55 (calling cards).

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(continued on next page)

and when it obtain Section 271 relief. This "jumpstart" on long distance services is prohibited under the scheme enacted by Congress in Section 271.[53] It ignores the fact that as a result of these arrangements, Qwest will be the single source of support services for local and all long distance services in and out of region customers, creating "the perception of Qwest as offering 'one stop shopping' to

The arrangements described herein permit the Applicants "premature entry into the long distance market by allowing them to accumulate an entrenched base of full-service customers before receiving section 271 authority, thereby undermining the incentive Congress created in section 271."[54] That is especially so because of the ease with which they will be able to reclaim these customers for even the transmission component of the interLATA services.

Applicants nevertheless seek to defend their proposal with an array of arguments, most of which were rejected in the Qwest Order. For example, Applicants argue that the

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53 Qwest Order, ¶ 41("[T]hrough their branding of the combined offering, both Ameritech and U S WEST are well poised to substitute the long distance service offered by their section 272 affiliate, when they obtain section 271 approval, into the CompleteAccess or Buyer's Advantage package in the future").

54 See, e.g., Qwest Order, ¶¶ 39, 41; Transcript of August 12, 1998, Qwest Status Conference (public version) at 95-96 (U S WEST attorney argued teaming arrangement with Qwest "creates no more, no less incentive to get to jump through the 271 hoops and get into long distance." Attorney for Ameritech argued that "benefits" of Qwest arrangements "pale[d] to insignificance when compared to the benefits" of Section 271 relief, and accordingly "we have great

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merged firm will not be holding itself out as a provider of in region long distance service, because customers will receive advance notice that Touch America, not Qwest provides such service.[55] Similar claims were made in Qwest and rejected.[56] As the Commission stated, "Congress has recognized that a BOC presently could gain competitive advantage merely by associating its brand with a long distance offering."[57]

The Applicants also claim that Touch America will always perform the core functions of carriers including determining its own rates, making its own decisions about marketing and promotions, setting its own policies about sales agents and other distribution channels, and retaining ultimate control over its own network facilities.[58] But these claims are no more valid or persuasive here than when they were made in support of the arrangement rejected by the Commission in the Qwest Order.

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incentive to get into long distance under 271 as quickly as possible ....").

55 Report at 43 (transitional services); 56 (calling card).

56 See, e.g., Answer of U S West Communications, Inc., Qwest Order, p 14 (filed June 26, 1998) ("All consumer marketing, whether inbound or outbound, plainly identifies Qwest as the provider of the long distance services."); id., pp. 9-10 (arguing U S West clearly identified Qwest and used Qwest's service mark, and that "[c]ustomers understand that Qwest is their long distance provider..."). Although Ameritech did not actively advertise CompleteAccess prior to the Qwest Order's release, it did argue that it fully disclosed Qwest's role in billing statements. See Ameritech Corporation's Brief In Opposition To The Motion Of AT&T Corporation And MCI Telecommunications Corporation For Interim Relief, Qwest Order, p. 16 (public version, filed June 22, 1998) (Ameritech's bills "clearly identify Qwest as the provider of long distance services purchased under the CompleteAccess program ... in the same manner that they identify any other IXCs ... that use Ameritech's billing and collection services ....").

57 Qwest Order ¶ 50.

58 Report at 43 (transition services); 56 (calling card).

The Applicants also argue that the support services will be limited to the types of services that interexchange carriers typically out-source; i.e.. billing and collection, call center services provided by a dedicated team of customer service representatives, and monitoring and maintenance of designated network equipment.[59] But this "outsourcing" test has no basis in law; nor is it at all consistent with the Commission's holding in the Qwest-U S West Merger Order.

The other arguments raised by the Applicants in an effort to distinguish their proposal from the arrangement held unlawful in the Qwest-U S West Merger Order expressly held, or otherwise defend that proposal, are equally non-meritorious. Specifically:

- Appellants claim that it "intends" to discuss possible joint marketing arrangements with carriers other than Touch America;[60] but a similar claim was deemed insufficient in the Qwest Order proceeding.
- The Applicants claim that all in-region marketing staff is being transferred to Touch America[61] exalts form over substance,

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59 Id., at 43.

60 Id., at 46.

61 Id., at 43.

- The Applicants also argue that these arrangements have nothing to do with in-region local service, a main concern in the Qwest Order.[62] This argument ignores the fact that for all these accounts, Qwest will not only be the out-of-region provider but also the incumbent local service provider. Thus Qwest will coordinate its out-of-region service with its in-region local service. Qwest will then coordinate with Touch America the in-region long distance with its other offerings – in-region local and out of region long distance. Thus, Qwest will be, and will be perceived as, the only source of one stop-shopping in-region.
- The Applicants claim that the Qwest Order held that marketing by a BOC is not per se unlawful[63] ignores the actual holding – that the marketing and selling of a prohibited service by a BOC might be permissible as long as the product or service was not "associated with its name."[64]

62 Report at 44 (transitional services), 47 (joint marketing).

63 Report at 46, n. 69 relying upon Qwest Order, ¶ 50.

64 Qwest Order, ¶ 50 (emphasis added).

- The Applicants' claim that "BOC provision of calling cards that facilitates access to in-region long distance was upheld long ago under the MFJ" misreads that precedent.[65]

While Touch America may supply the underlying in-region interLATA transmission, Qwest effectively controls the offering, holds itself out as the provider of carrier services, controls the customer care channels and is pre-positioning itself for

65 Report at 55, citing to United States v. Western Elec. Co., 698 F. Supp. 348, 353 (D.C. Cir. 1988) ("Calling Card Case")). However, the types of calling card approved by the MFJ court were only calling cards for which the customer selects the long distance carrier and the card accommodates the customer's selection. These cards were used only as billing mechanisms for the customer's selected carrier, and interLATA services were provided to users of such cards on terms and conditions controlled exclusively by the long distance carrier the customer chose—the BOC issuing a particular card was, by design, utterly indifferent to the carrier card users selected for interLATA calling. See Calling Card Case, 698 F. Supp. at 353. As the Commission recognized in the Qwest Order, the Calling Card Case "determined that the BOCs could issue calling cards useable for both local and long distance calls, provided that they did not discriminate among the various interexchange carriers with respect to the calling cards." Qwest Order ¶ 56. Here, of course, purchasers of the Qwest Internet service and calling and prepaid card cannot use any long distance carrier other than Qwest, and that carrier offers service on terms and conditions largely determined by BellSouth. The Applicants' claim that the prepaid card arrangement is lawful under Section 271, relying upon the Common Carrier Bureau's decision in AT&T Corp. v. BellSouth Long Distance, Inc., File No. EAD-99-001, currently before the Commission, Report at 62-63, is equally non-meritorious. See AT&T's Application for Review in that proceeding, filed on April 14, 1999, and its Reply filed on May 10, 1999 which AT&T incorporates herein by reference. Qwest claims that prepaid card service is distinguishable from the Qwest Order because customers that utilize prepaid cards do not thereby form a lasting relationship with the carrier providing interLATA services for that card, and Qwest thus does not obtain the type of material benefit at issue in Qwest. The plain language of Section 271 makes clear that section is not limited to presubscribed interLATA services. A BOC or BOC affiliate violates Section 271 if it provides prohibited in-region interLATA services in any fashion, whether by offering dial-around services or wholesaling interLATA transport. See Bell Atlantic v. FCC, 131 F.3d 1044 (D.C. Cir. 1997).